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February 11, 2002

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EX PARTE

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Notification of Ex Parte Communication in ET Docket 98-206; RM-9147; RM-9245; Applications of Broadwave USA et al., PDC Broadband Corporation, and Satellite Receivers, Ltd., to provide a fixed service in the 12.2-12.7 GHz Band; Requests of Broadwave USA et al. (DA 99-494), PDC Broadband Corporation (DA 00-1841), and Satellite Receivers, Ltd. (DA 00-2134) for Waiver of Part 101 Rules.

Dear Mr. Caton:

On February 8, 2002, Sophia Collier, Chula Reynolds, and Antoinette Cook Bush of Northpoint Technology, Ltd. ("Northpoint") met with Chairman Powell and his Senior Legal Advisor Peter Tenhula. The purpose of the meeting was to discuss the pending license applications of Northpoint's Broadwave USA affiliates to provide terrestrial service in the 12.2-12.7 GHz frequency band. Northpoint repeated its request that the Commission grant its pending applications (and associated waiver requests) without an auction.

The attached presentation, which was distributed at the meeting, summarizes the main points discussed. Northpoint emphasized that the Commission's spectrum allocation and licensing policies and procedures are biased in favor of satellite operators and against terrestrial users. In the current proceedings, for example, NGSO FSS operators are scheduled to receive some 3,250 MHz without an auction, while only 500 MHz has been allocated to terrestrial services – and the Commission is considering an auction of the terrestrial licenses. Northpoint noted that other terrestrial users might have been accommodated in other parts of the NGSO FSS allocation.

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Mr. William F. Caton
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Eighteen copies of this letter are enclosed – two for inclusion in each of the above-referenced files. Please contact me if you have any questions.

Yours sincerely,

A handwritten signature in black ink, appearing to read "JC Rozendaal". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

J.C. Rozendaal
Counsel for Northpoint Technology, Ltd.

attachment

Disparate Processing Prejudiced Northpoint and All Future MVDDS Applicants

- Failure to call for terrestrial applicants at the same time as satellite applicants prevented the Commission from knowing the full universe of terrestrial applicants and affording them equal treatment with NGSO applicants.
- Prejudiced Northpoint and all future innovative terrestrial applicants
 - 3,250 MHz allocated for NGSO; 500 MHz for new terrestrial
 - “Sharing budget” disproportionately allocated to NGSO
 - Terrestrial operator’s technical options for terrestrial-terrestrial sharing have been foreclosed by Commission actions taken solely to accommodate all eight NGSO applicants.

2001 Licensing Actions - FCC Decisions on When to Auction or Not Auction Seem Arbitrary

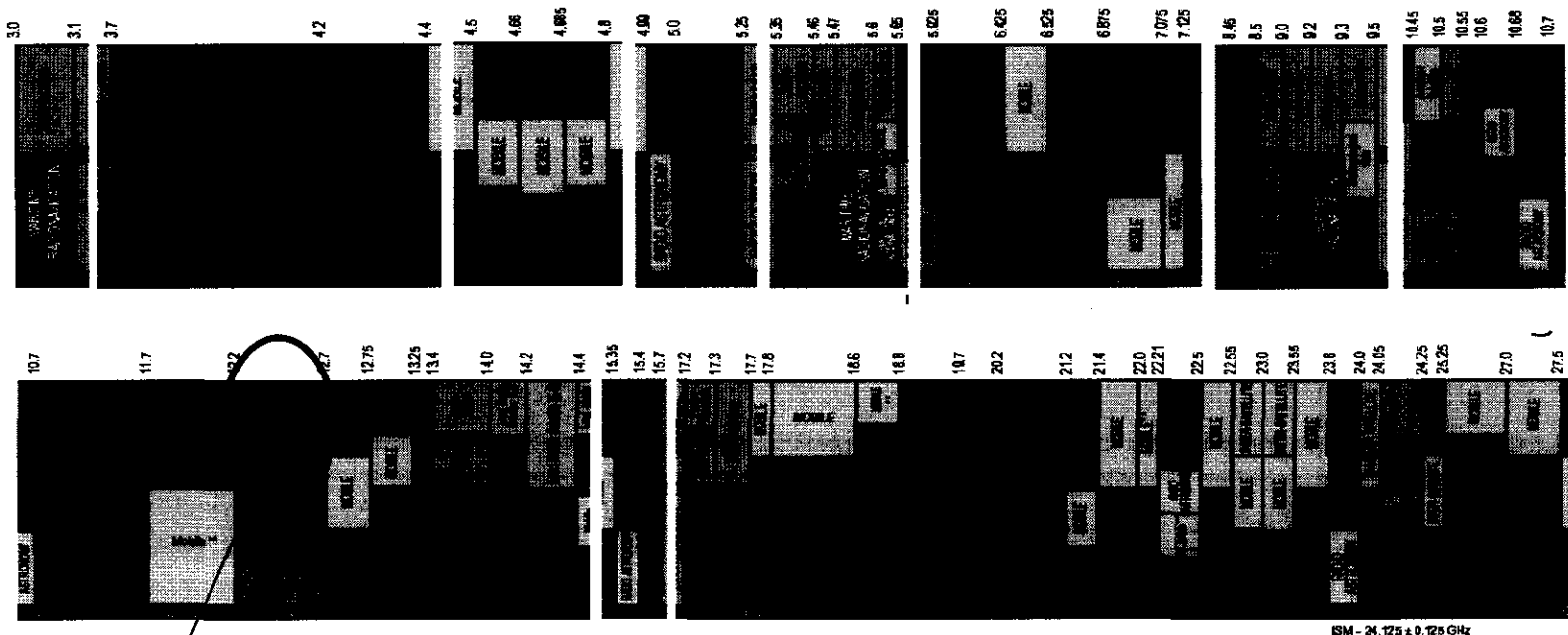
- Satellite systems: Aug. 2001: 11 companies granted 66,000 MHz of spectrum without auction. No assertion that ORBIT prohibited auction. Licenses given to Hughes, Pegasus, Echostar, et al.
- Hybrid systems: Dec 2001: Boeing given blanket license to operate Connexion system. No “service” created. No call for competing applications. No auction. License granted in less than a year through a “waiver” in a spectrum band where a rulemaking was being conducted for other services!
- Ground based wireless licenses: Over 11,000 granted in 2001 without auction, primarily to large commercial telecommunications companies such as Nextel, AT&T Wireless, Verizon, et al.
- Cable Relay Licenses: All licenses granted without auction in 2001.
- Northpoint: Seeks license to operate using 500 MHz of spectrum capacity created through its own technology.
 - Auction considered. Will share with the eight systems with whom it applied on the same day, sharing the very same spectrum, offering the same or similar services that will not be subject to auction.

Commission Inexplicably Granted Boeing's Waiver Application for 1000 MHz of Ku-Band Spectrum Without Calling for Competing Applications

- Boeing sought & received authorization to provide two-way broadband “entertainment and data services to passengers and crew on commercial and private aircraft” in the 14.0-14.5 GHz and 11.7-12.2 GHz spectrum (in 12 months!).
- The spectrum at issue is the subject of ET Docket 98-206 and related proceedings for licensing terrestrial and NGSO FSS services in the Ku-band.
- At least one commenter (Lockheed Martin Corp.) specifically suggested deferring processing of Boeing's application in order for the FCC to conduct a comprehensive rulemaking on Boeing's proposed new service and possibly other new uses of the Ku-band.
- FCC declined to initiate rulemaking on secondary, non-conforming, and other possible new uses of the Ku-band.
- FCC never opened a filing window or otherwise called for competing applications to provide the proposed service.
- FCC never proposed auctioning the right to use the desired spectrum for the proposed new service.

Northpoint Seeks Parity With Other Microwave Operators

- The FCC has never conducted a single auction for any ground based license in the spectrum band 3 – 27 GHz (42,770 microwave licenses have been issued without auction since 1993 when the FCC obtained auction authority).
- Why would the Commission choose to single out for auction the one band where a company created its own bandwidth through a new technology?



Northpoint Seeks Parity With DBS Operators

- When the DBS service was established, all DBS licenses were issued without auction.
 - DBS is currently using 5,800 MHz of spectrum capacity granted to it without auction.
 - DirecTV has never participated in an auction.
 - The two slots that were auctioned in 1996 were anomalies and the Commission has returned to its no-auction policy for DBS operators with its August 2001 Ka-Band grants.
 - Notably Pegasus, DirecTV's largest distributor – who has advocated an auction for Northpoint – was given five nationwide licenses in the Ka-Band *without an auction*. Hughes Electronics, parent of DirecTV, got eight nationwide licenses, again without an auction.

Recent Supreme Court and D.C. Circuit Decisions Support to Northpoint's Reading of the ORBIT Act as Prohibiting Auctions in 12.2-12.7 GHz Spectrum

- Supreme Court's decision in *National Cable & Telecommunications Ass'n, Inc. v. Gulf Power Co.*, No. 00-832 (Decided Jan. 16, 2002) emphasizes close, literal reading of statutory text:
 - Communications Act gives the FCC jurisdiction over pole attachments “by” a cable TV system.
 - The word “by” limits pole attachments by who is doing the attaching, not by what is attached.
 - Therefore, FCC has jurisdiction over attachments by a cable TV system, *regardless of whether the cable TV system does other things as well.*
- D.C. Circuit's decision in *National Public Radio v. FCC*, 354 F.3d 226 (D.C. Cir. 2001), likewise emphasizes close, literal reading of statutory text:
 - Auction authority under the Communications Act “shall not apply for licenses or construction permits issued by the Commission . . . for [noncommercial educational broadcast stations and public broadcast stations].”
 - The quoted passage limits the FCC's authority based on who is receiving the license, not what part of the spectrum the licensee will operate in.
 - Therefore, the Commission lacks authority to auction licenses to noncommercial educational broadcast stations, *regardless of what portion of the spectrum they operate in.*
- Northpoint's interpretation of the ORBIT Act relies on close, literal reading of statutory text:
 - ORBIT Act provides that FCC “shall not have the authority to assign by competitive bidding orbital locations or spectrum used for the provision of international or global satellite communications services.”
 - The quoted passage limits the FCC's authority based on the portion of the spectrum being licensed, not by who is receiving the license.
 - Therefore, the FCC lacks authority to auction off spectrum used for international and global satellite communications (including the 12.2-12.7 GHz band), *regardless of whether the spectrum is used for other things as well, and regardless of who is receiving the license.*

CERTIFICATE OF SERVICE

I, Shonn Dyer, hereby certify that on this 11th day of February, 2002, copies of the foregoing were served by hand delivery* and/or first class United States mail, postage prepaid, on the following:

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Federal Communications Commission
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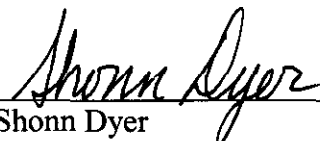
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